



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AP63

Approval criteria for rates charged for Community Residential Care

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Affairs (VA) adopts as final, with changes, a proposed rule amending its regulation governing standards applicable to a community residential care facility (CRC) approved by VA. This rule also addresses the amount that a veteran may be charged for residence in a CRC and how VA determines whether that rate is appropriate. The cost of community residential care is financed by the veteran's own resources, and the resident or an authorized personal representative and a representative of the CRC must agree upon the charge and payment procedures for community residential care. VA reviews and has approval authority over this agreement. The rule amends and updates the criteria VA uses to determine whether the rate for care charged to a veteran residing in an approved CRC is appropriate, clarifying how VA determines whether a CRC rate should be approved, consistent with current VA practice. In addition, this rulemaking defines in regulation the level of care that must be provided to a veteran residing in a CRC.

DATES: This final rule is effective on [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Dayna Cooper, Chief, Home and Community Based Programs, Geriatrics and Extended Care (10NC4), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, dayna.cooper3@va.gov (202) 632-8321. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In a document published in the Federal Register on April 24, 2018, VA proposed to amend its regulation governing standards applicable to a CRC approved by VA. 83 FR 17777. VA provided a 60-day comment period, which ended on June 25, 2018. We received three comments on the proposed rule and make no changes based on these comments. We adopt the proposed rule as is, with the exception of minor technical amendments and corrections as explained further in this rulemaking.

VA is authorized under 38 U.S.C. 1730 to assist veterans by referring them for placement, and aiding veterans in obtaining placement, in CRCs. A CRC is a form of enriched housing that provides health care supervision to eligible veterans not in need of hospital or nursing home care, but who, because of medical, psychiatric and/or psychosocial limitations as determined through a statement of needed care, are not able to live independently and have no suitable family or significant others to provide the needed supervision and supportive care. CRC care consists of room, board, assistance with activities of daily living and supervision as required on an individual basis. The size of a CRC can vary from one bed to several hundred. VA maintains a list of approved CRCs. Employees of the CRC are not VA employees, and no employment relationship exists between employees of the CRC and VA.

A veteran may elect to reside in any CRC he or she wants; however, VA will only recommend CRCs that apply for approval and meet our standards. Once approved by VA, the CRC is placed on VA's referral list and VA refers veterans for whom CRC care is an option to listed CRCs when those veterans are determining where they would like to live. To become approved, a CRC must meet the specified criteria in 38 CFR 17.63, which sets forth standards relating to the physical integrity of the facility, the health care provided at the CRC, the standard of living therein, costs charged directly to veteran residents of the CRC, and other criteria for approval.

We proposed removing the definition of "daily living activities" and substituting the terms "activities of daily living" and "instrumental activities of daily living" where it is used in §§ 17.61(b) and 17.62. In the latter section, we proposed defining "activities of daily living" as basic daily tasks an individual performs as part of self-care which may be used as a measurement of the functional status of a person including: walking; bathing, shaving, brushing teeth, combing hair; dressing; eating; getting in or getting out of bed; and toileting. We proposed defining "instrumental activities of daily living" as tasks that are not necessary for fundamental functioning, but allow an individual to live independently in a community. Instrumental activities of daily living include: housekeeping and cleaning room; meal preparation; taking medications; laundry; assistance with transportation; shopping- for groceries, clothing or other items; ability to use the telephone; ability to manage finances; writing letters; and obtaining appointments. In addition, we proposed revising § 17.62 by removing the paragraph designations for the definitions in that section, arranging the defined terms in alphabetical order, and making non-substantive changes to the definitions to make the

introductory wording for each definition consistent with that of other defined terms in part 17.

The proposed rule also focused on CRC standards set forth in § 17.63. We proposed revising paragraph (b) to state that the CRC must provide the resident, at a minimum, a base level of care to include room and board; nutrition consisting of three meals per day and two snacks, or as required to meet special dietary needs; laundry services; transportation (either provided or arranged) to VA and healthcare appointments; and accompanying the resident to appointments if needed; 24-hour supervision, if indicated; and care, supervision, and assistance with activities of daily living and instrumental activities of daily living.

Paragraph (k) of this section addresses the amount that a veteran may be charged for residence in a CRC and how VA determines whether that rate is appropriate. VA proposed amending and updating this paragraph to make it consistent with changes in the practices of approved CRCs since this provision became effective on June 14, 1989, and to clarify the criteria VA uses to determine whether the rate charged by the CRC is reasonable. We proposed amending paragraph (k)(2) to state that the cost of community residential care should reflect the cost of providing the base level of care as defined in paragraph (b). Proposed paragraph 17.63(k)(3) would retain the requirement, currently found in paragraph 17.63(k)(2), that the resident or an authorized personal representative and a representative of the CRC facility must agree upon the charge and payment procedures for community residential care.

We proposed to add paragraph (k)(4) to establish standards for use by a VA approving official in reviewing and approving this agreement consistent with current

practice. We proposed that the charges for community residential care must be reasonable and comparable to the current average rate for residential care in the State or Region for the same level of care provided to the resident. Any year to year increase in the charge for care in a community residential care facility for the same level of care may not exceed the annual percentage increase in the National Consumer Price Index (CPI) for that year. We stated that the approving official would have the authority to approve a rate lower than the current average rate for residential care in the State or Region for the same level of care if the CRC and resident agreed to such rate, and the lower rate does not result in a lower level of care than the resident requires.

Conversely, the approving official would have the authority to approve a rate higher than the current average rate for residential care in the State or Region for the same level of care if the CRC and resident or authorized personal representative agreed to such rate, and the higher rate is related to the individual needs of the resident which exceed the base level of care as defined in paragraph (b).

We received three comments. One commenter generally supported the rulemaking while two raised issues which we respond to here.

One commenter stated that although the United States government assumes no responsibility for paying the cost for care in these facilities, it provides the eligibility requirements under which the residents referred by VA are to receive assistance. The commenter stated that this limits patient choice options and financially neglects patients needing assistance outside of hospital stays. The commenter asserted that the federal government should provide financial assistance to this population much like it does for the veteran homeless community with the Grant and Per Diem program in which it pays

entities providing transitional housing to homeless veterans. Additionally, the commenter expressed concern that the proposed rule does not ensure criteria for standardizing levels of care which may subject veterans to inequalities in care. The commenter further asserted that this proposed rule may result in a high occurrence of low level care being suggested to save on payment for services. Furthermore, the commenter stated that there are no insurances or safeguards to ensure that care evaluation costs for lower levels of care rendered are not overinflated to justify a larger budget request. The commenter asserted that in this case a veteran would not be given a choice above VA standards which may be lower than what the veteran actually needs.

The CRC program provides a form of enriched housing and health care supervision to eligible veterans not in need of acute hospital care but who, because of medical and/or psychosocial health conditions, are not able to live independently and have no suitable family or significant others to provide the needed supervision and supportive care. VA does not have the authority to provide financial assistance to veterans through the CRC program, and providing such assistance through another vehicle is outside the scope of this rulemaking. Also, this rulemaking does address standardization of care by requiring CRCs to provide a base level of care. CRCs must provide, at a minimum, room and board; nutrition consisting of three meals per day and two snacks, or as required to meet special dietary needs; laundry services; transportation (either provided or arranged) to VA and healthcare appointments, and accompanying the resident if needed; 24-hour supervision, if indicated; care supervision, and assistance with activities of daily living and independent activities of daily living. CRCs are also required to provide medically appropriate level of care for

residents who require more than a base level of care. VA does not provide financial assistance to veterans through the CRC program nor does it determine the average rate for residential care in each state or region; thus, the determination of level of care needed by a veteran residing in a CRC is based solely on clinical need. Additionally, VA uses a multi-step approach in evaluating whether a proposed CRC rate will be approved. This approach includes a review of the level of care a veteran requires; the current average rate of residential care in the state or region for the same level of care provided to the resident, as determined by each state; and the current CRC rate being charged to a veteran. This review ensures that a veteran receives the individualized level of care required, and that the CRC is compensated for the level of care provided. We make no changes based on this comment.

Another commenter stated that VA should pay for CRC care. While VA is authorized to operate the CRC program under 38 U.S.C. 1730, the statute explicitly exempts VA from any responsibility for payment for CRC care. The statute also states that VA may assist a veteran by referring such veteran for placement, and aiding such veteran in obtaining placement, in a VA-approved CRC. Per 38 U.S.C. 1730(b)(3), payment of the charges of a CRC for any care or service provided to a veteran whom VA has referred to that facility is not the responsibility of the United States or VA. We make no changes based on this comment.

In this final rule, we are also making minor technical amendments and corrections. These changes are non-substantive but are necessary to remedy drafting errors in the proposed rule. We are amending the authority citation in this final rule to only reflect the CFR sections that are affected by this rule, which are §§ 17.61 through

17.74. Also, in § 17.62 we are amending typographical errors in the definitions for “activities of daily living” and “instrumental activities of daily living” by replacing the uppercase letter following the colon with its matching lowercase letter. Furthermore, in § 17.63(k)(4)(i) we are also amending a typographical error by replacing the first uppercase letter in the section with the matching lowercase letter.

Based on the rationale set forth in the proposed rule and in this document, VA is adopting the provisions of the proposed rule as a final rule with changes as noted above.

Effect of rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA’s implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521). Under 38 CFR 17.63(i), a CRC must maintain records on each resident, to include a copy of all signed agreements with the resident. This would include any agreement between the CRC and the resident regarding the rate charged for residence in the facility, which is the subject of this final rule. This information collection is already approved under Office of Management and Budget (OMB) control number 2900-0491.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This final rule would amend § 17.63 which governs the standards applicable to a community residential care facility (CRC) approved by VA. This final rule would merely conform this regulation with our current practices. This final rule would directly affect only individuals and those small entities that seek inclusion on VA's approved list of CRCs. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action," requiring review by OMB, unless OMB waives such review, as "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal

governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www.va.gov/orpm>, by following the link for "VA Regulations Published." This final rule is not an EO 13771 regulatory action because this rule is not significant under EO 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles affected by this document are 64.011 - Veterans Dental Care; 64.012 - Veterans

Prescription Service; 64.013 - Veterans Prosthetic Appliances; 64.029 - Purchase Care Program; 64.035 - Veterans Transportation Program; 64.041 - VHA Outpatient Specialty Care; 64.044 - VHA Home Care; 64.045 - VHA Outpatient Ancillary Services; 64.047 - VHA Primary Care; 64.048 - VHA Mental Health clinics; 64.050 - VHA Diagnostic Care.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and Dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on July 9, 2019, for publication.

Dated: July 9, 2019.

Consuela Benjamin,

Regulations Development Coordinator,
Office of Regulation Policy & Management,

Office of the Secretary,
Department of Veterans Affairs.

For the reasons stated in the preamble, Department of Veterans Affairs amends 38
CFR part 17 as follows:

PART 17 – MEDICAL

1. The authority citation for part 17 is amended by adding an authority for §§
17.61 through 17.74 to read as follows:

AUTHORITY: 38 U.S.C. 501, and as noted in specific sections.

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Sections 17.61 through 17.74 are also issued under 38 U.S.C. 1730.

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§ 17.61 [Amended]

2. Amend § 17.61 by:

- a. Removing in paragraph (b) the words “daily living activities” and adding in its place the words “activities of daily living and instrumental activities of daily living”; and
- b. Removing the statutory authority citation at the end of the section.

3. Revise § 17.62 to read as follows:

§ 17.62 Definitions.

For the purpose of §§ 17.61 through 17.72:

Activities of daily living means basic daily tasks an individual performs as part of self-care which may be used as a measurement of the functional status of a person including: walking; bathing, shaving, brushing teeth, combing hair; dressing; eating; getting in or getting out of bed; and toileting.

Approving official means the Director or, if designated by the Director, the Associate Director or Chief of Staff of a Department of Veterans Affairs Medical Center or Outpatient Clinic which has jurisdiction to approve a community residential care facility.

Community residential care means the monitoring, supervision, and assistance, in accordance with a statement of needed care, of the activities of daily living activities and instrumental activities of daily living, of referred veterans in an approved home in the community by the facility's provider.

Hearing official means the Director or, if designated by the Director, the Associate Director or Chief of Staff of a Department of Veterans Affairs Medical Center or Outpatient Clinic which has jurisdiction to approve a community residential care facility.

Instrumental activities of daily living are tasks that are not necessary for fundamental functioning, but allow an individual to live independently in a community. Instrumental activities of daily living include: housekeeping and cleaning room; meal preparation; taking medications; laundry; assistance with transportation; shopping—for groceries, clothing or other items; ability to use the telephone; ability to manage finances; writing letters; and obtaining appointments.

Oral hearing means the in person testimony of representatives of a community residential care facility and of VA before the hearing official and the review of the written evidence of record by that official.

Paper hearing means a review of the written evidence of record by the hearing official.

4. Amend § 17.63 by:

- a. Adding paragraph (b);
- b. Revising paragraph (k); and
- c. Removing the statutory authority citation at the end of the section.

The addition and revision read as follows:

§ 17.63 Approval of community residential care facilities.

* * * * *

(b) Level of care. The community residential care facility must provide the resident, at a minimum, a base level of care to include room and board; nutrition consisting of three meals per day and two snacks, or as required to meet special dietary needs; laundry services; transportation (either provided or arranged) to VA and healthcare appointments; and accompanying the resident to appointments if needed; 24-hour supervision, if indicated; and care, supervision, and assistance with activities of daily living and instrumental activities of daily living. In those cases where the resident requires more than a base level of care, the medically appropriate level of care must be provided.

* * * * *

(k) Cost of community residential care. (1) Payment for the charges of community residential care is not the responsibility of the United States Government or VA.

(2) The cost of community residential care should reflect the cost of providing the base level of care as defined in paragraph (b) of this section.

(3) The resident or an authorized personal representative and a representative of the community residential care facility must agree upon the charge and payment procedures for community residential care. Any agreement between the resident or an authorized personal representative and the community residential care facility must be approved by the approving official. The charge for care in a community residential care facility must be reviewed annually by the facility and VA, or as required due to changes in care needs.

(4) The charges for community residential care must be reasonable and comparable to the current average rate for residential care in the State or Region for the same level of care provided to the resident. Notwithstanding, any year to year increase in the charge for care in a community residential care facility for the same level of care may not exceed the annual percentage increase in the National Consumer Price Index (CPI) for that year. In establishing an individual residential rate, consideration should be given to the level of care required and the individual needs of the resident. The approving official may approve a rate:

(i) lower than the current average rate for residential care in the State or Region for the same level of care if the community residential care facility and the resident or

authorized personal representative agreed to such rate, provided such lower rate does not result in a lower level of care than the resident requires;

(ii) higher than the current average rate for residential care in the State or Region for the same level of care if the community residential care facility and the resident or authorized personal representative agreed to such rate, and the higher rate is related to the individual needs of the resident which exceed the base level of care as defined in paragraph (b) of this section. Examples of services which exceed the base level of care include, but are not limited to, handling disbursement of funds solely at the request of the resident; fulfilling special dietary requests by the resident or family member; accompanying the resident to an activity center; assisting in or providing scheduled socialization activities; supervision of an unsafe smoker; bowel and bladder care; intervention related to behavioral issues; and transportation other than for VA and healthcare appointments.

(5) The approving official may approve a deviation from the requirements of paragraph (k)(4) of this section if the resident chooses to pay more for care at a facility which exceeds the base level of care as defined in paragraph (b) of this section notwithstanding the resident's needs.

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§§ 17.64 through 17.74 [Amended]

5. Amend §§ 17.64 through 17.74 by removing the statutory authority citation at the end of each section.

[FR Doc. 2019-14918 Filed: 7/12/2019 8:45 am; Publication Date: 7/15/2019]